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No. 97-0570

Supreme Court, U.S.
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In The

# Supreme Court of the United States

October Term, 1997

DUCHESNE COUNTY, UTAH
and
UINTAH COUNTY, UTAH,

*Petitioners,*

*vs.*

THE UTE INDIAN TRIBE
OF THE UINTAH AND OURAY RESERVATION

*Respondent.*

*On Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit*

## RESPONDENT'S BRIEF IN OPPOSITION TO THE PETITION FOR A WRIT OF *CERTIORARI*

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3798

## QUESTIONS PRESENTED

As phrased by the petitioners, the "questions presented" are convoluted and difficult (if not impossible) to comprehend. For purposes of clarity, the respondent suggests that those questions be rephrased as follows:

1. Did the United States Court of Appeals for the Tenth Circuit err when it refused to expand this Court's decision in *Hagen v. Utah*, 510 U.S. 399, 114 S.Ct. 958, 127 L.Ed.2d 252 (1994) to remove, from "Indian country" status, those lands on the Uintah Valley Reservation that were never restored to the public domain and were never opened to non-Indian settlement, but which have passed from trust into fee status under Congressional Acts *other* than those examined by this Court in *Hagen*.

2. Did the United States Court of Appeals for the Tenth Circuit err when it refused to reconsider its final decision in *Ute Indian Tribe v. Utah*, 773 F.2d 1087 (10th Cir. 1985), *cert. denied*, 479 U.S. 994 (1986) insofar as that decision addressed the "Indian country" status of lands that were not addressed by this Court in *Hagen v. Utah*, 510 U.S. 399, 114 S.Ct. 958, 127 L.Ed.2d 252 (1994) or by the Utah Supreme Court in *State v. Perank*, 858 P.2d 927 (1992).

## PARTIES TO THE PROCEEDINGS

The petition accurately lists the parties to the proceedings. As noted in the petition, the State of Utah and the Cities of Roosevelt and Duchesne, each of which is a municipal corporation, were defendants in the proceedings below.

Although the Tenth Circuit's decision in *Ute Indian Tribe v. Utah*, 114 F.3d 1513 (10th Cir. 1997), affects the State of Utah as much as, or more than, Duchesne and Uintah Counties, the State has not petitioned this Court, nor has it joined in the Counties' petition, for a writ of *certiorari* to review the Tenth Circuit's decision.

Similarly, neither the City of Roosevelt nor the City of Duchesne has petitioned this Court, or joined in the Counties' petition, for a writ of *certiorari* to review the Tenth Circuit's most recent decision in *Ute Indian Tribe v. Utah.*

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## STATEMENT OF THE CASE

The Uintah and Ouray Indian Reservation consists of two separate but contiguous tracts of land set aside in the nineteenth century for the use and occupancy of the ancestors of the people who comprise the present-day Ute Indian Tribe.[1]

The Uintah Valley Reservation

On October 3, 1861, President Lincoln established the Uintah Valley Reservation along a river in the Territory of Utah then known as the Uinta, but now referred to as the Duchesne. *See* Executive Order No. 38-1, *reprinted in* 1 Charles J. Kappler, *Indian Affairs: Laws and Treaties* 900 (2d ed. 1904). Congress confirmed the President's action in 1864, providing that the land in question was "set apart for the permanent and exclusive occupation of such of the different tribes of Indians of the [Utah] territory as may be induced to inhabit the same." Act of May 5, 1864, ch. 77, § 2, 13 Stat. 63. Between 1866 and 1878, the members of the Uintah Band of Ute Indians (who were indigenous to what is now known as the "Wasatch Front" in the State of Utah) gradually moved onto the Uintah Valley Reservation and made it their permanent home. *See* O'Neil, *The Reluctant Suzerainty: the Uintah and Ouray Reservation,* 39 Utah Historical Quarterly 129, 131 (Spring 1971).

During the same time that the Uintah Utes were

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[1] In 1938, under the authority of the Indian Reorganization Act, Act of June 18, 1934, ch. 576, 48 Stat. 984, *codified at* 25 U.S.C. §§ 461-479, three formerly autonomous bands of Ute Indians (the Uintahs, Uncompahgres and Whiterivers) united under a single constitution to form the Ute Indian Tribe. *See* Preamble, Constitution of the Ute Indian Tribe of the Uintah and Ouray Indian Reservation.

removing to the Uintah Valley Reservation, the Utes in Colorado were facing pressure of "firestorm proportions", *see Ute Indian Tribe v. Utah*, 521 F.Supp. 1072, 1096 (D. Utah 1975), *aff'd in relevant part*, 773 F.2d 1087 (10th Cir. 1985), *cert. denied*, 479 U.S. 994 (1986), to abandon their large reservation, which had been created by the Treaty of March 2, 1868, 15 Stat. 619, II Kapp. 990 (2d ed. 1904). Ultimately, title to the Yamparka (now Whiteriver) Utes' vast reservation in western Colorado was extinguished and the 700 band members were moved at gunpoint to the Uintah Valley Reservation in 1880, after 20 members of the band participated in an attack on Indian agent Nathan Meeker and his family. *Id.* at 1097 & n.72. The government also secured the consent of the Tabeguache (now Uncompahgre) Utes (who inhabited the central portion of the Ute Reservation in Colorado) to a removal agreement that was signed on March 6, 1880, and was ratified by Congress on June 15, 1880. *See* Act of June 15, 1880, 21 Stat. 199.

The Uncompahgre Reservation

Originally, the government planned to resettle the Uncompahgre Utes near the present location of Grand Junction, Colorado. Instead, a federal commission selected a large rectangular area of uninhabited and largely uninhabitable land in eastern Utah bordering on Colorado's western boundary as the Uncompahgres' new home. *See* Report of the Commissioner of Indian Affairs, 1881, at 37. By an Executive Order dated January 5, 1882, President Arthur formally established those lands as an Indian reservation for the use and occupancy of the Uncompahgre Utes. *See* I Charles Kappler, *Indian Affairs: Laws and Treaties* 901 (2d ed. 1904).

Before the end of the nineteenth century, the Uintah Valley and Uncompahgre Reservations - like many others -

became the subject of the "familiar forces" brought to bear by "the desire of non-Indians to settle upon Reservation lands." *See DeCoteau v. District County Court*, 420 U.S. 425, 431-32, 95 S.Ct. 1082, 1086, 43 L.Ed.2d 300 (1975). Those forces led to the passage in 1887 of the General Allotment Act, which granted the President the authority "to allot portions of reservation land to tribal members and, with tribal consent, to sell the surplus lands to white settlers, with the proceeds of those sales being dedicated to the Indians' benefit." *See DeCoteau, supra,* 420 U.S. at 432, 95 S.Ct. at 1987 (citing Act of Feb. 8, 1887, ch. 119, 24 Stat. 388).

Opening of the Uintah Valley Reservation

Several bills were introduced during the last decade of the nineteenth century to allot the Uintah Valley Reservation and open the unallotted lands to non-Indian settlement. *See Hagen v. Utah*, 510 U.S. 399, 402, 114 S.Ct. 958, 961, 127 L.Ed.2d 252 (1994). In part because the Uintah and Whiteriver Utes steadfastly refused to surrender any portion of their Reservation, allotment did not occur until the present century. *Id.*

In 1902, Congress passed an Act providing that, if a majority of the adult male members of the Uintah and Whiteriver bands consented, the Secretary of the Interior should make allotments by October 1, 1903, out of the Uintah Valley Reservation. The 1902 Act also provided that, when the October 1, 1903, deadline for allotments passed, "all the unallotted lands within said reservation shall be restored to the public domain". 32 Stat. 263.

The allotments did not proceed as provided for by the 1902 Act and measures extending the time for opening the Uintah Valley Reservation were enacted in 1903 and 1904. *See* Act of Mar. 3, 1903, ch. 994, § 1, 32 Stat. 997-98; Act of Apr. 21, 1904, ch. 1402, § 1, 33 Stat. 207-08. By the Act

of Mar. 3, 1905, ch. 1479, 33 Stat. 1048 (hereafter, "the 1905 Act"), Congress again deferred the time for opening the unallotted lands on the Uintah Valley Reservation to public entry, this time to September 1, 1905. Section 1, 33 Stat. 1069. The 1905 Act then specified "the manner of opening such lands for settlement and entry, and for disposing of the same." *Ibid.* Specifically, the 1905 Act provided that the unallotted lands "shall be disposed of under the general provisions of the homestead and townsite laws of the United States." *Ibid.*[2]

Although the government failed to obtain the consent of the Uintah and Whiteriver Utes to the allotment of their lands and opening of the unallotted lands to non-Indian settlement,[3] President Theodore Roosevelt issued a Proclamation on July 14, 1905, which declared that "the unallotted lands in [the Uintah Valley] Reservation * * * will on and after the 28th day of August, 1905 * * * be opened to entry, settlement and disposition under the general provisions of the homestead and townsite laws of the United States." 34 Stat. 3120.

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[2] In addition to extending the time of entry under the 1902 Act and describing the entry process, the 1905 Act authorized the President to "set apart and reserve" lands in the Reservation as a forest reserve prior to opening the unallotted lands to settlement. 33 Stat. 1070. Pursuant to this authority, on July 14, 1905, President Theodore Roosevelt issued a proclamation designating some 1,010,000 acres within the Uintah Valley Reservation as an addition to the Uintah National Forest Reserve. Proclamation of July 14, 1905, 34 Stat. 3113, 3116.

[3] Only 82 of the 280 adult male Utes who were eligible to vote consented to the allotment plan. *See* H.R. Doc. No. 33, 85th Cong., 1st Sess. 5 (1903).

Opening of the Uncompahgre Reservation

Allotment of the barren Uncompahgre Reservation proceeded at a much more rapid pace than allotment and opening of the comparatively more fertile Uintah Valley Reservation. Three bills were introduced in 1894 providing "for opening the Uncompahgre . . . reservation[]". *See* H.R. 4511, 6557; S.Rep.No. 450, 53d Cong., 2d Sess. 4027 (1894). Although these bills were not enacted, the Indian Appropriations Act for the year included H.R. 6557 which directed a presidential commission to allot the Uncompahgre reservation and to open the unallotted lands "to entry under the homestead and mineral laws of the United States." In large part because there were insufficient agricultural lands available on the Uncompahgre Reservation to comply with the Act, the presidential commission's attempts to carry out the 1894 Act failed. *See* H.R. Doc. No. 191, 54th Cong., 1st Sess. (1896); S. Doc. No. 161, 54th Cong., 1st Sess (1896).

Congress addressed the lack of sufficient agricultural lands on the Uncompahgre Reservation in the Act of June 7, 1897, ch. 3, 30 Stat. 62, 87, I Kapp. 621 (2d ed. 1904). In that Act, Congress directed the Secretary of the Interior to allot agricultural lands on "the Uncompahgre and the Uintah Reservation or elsewhere in [Utah]" to the Uncompahgres. *Id.* Congress further directed that the unallotted lands on the Uncompahgre Reservation "be open for location and entry under all the lands laws of the United States" beginning on April 1, 1898. *Ibid.* Eventually, by separate statute, Congress confirmed 83 allotments that were made within the Uncompahgre Reservation. *see* Act of Mar. 1, 1899, ch. 324, 30 Stat. 924, 940-41, I Kapp. 686 (2d ed. 1904). An additional 584 Uncompahgre allotments, made on the Uintah Valley Reservation, were approved in 1905. *See* Report of the Commissioner of Indian Affairs, 1905, at 146.

*Ute Indian Tribe I, II and III*

In 1975, the Ute Indian Tribe filed a declaratory judgment action in the Federal District Court for the District of Utah. Parties to the proceedings included the Ute Indian Tribe, as plaintiff; the State of Utah as defendant-intervenor; the Counties of Duchesne and Uintah; and the Cities of Roosevelt and Duchesne. *See Ute Indian Tribe v. Utah*, 521 F.Supp. 1072 (D. Utah 1981), *aff'd in relevant part*, 773 F.2d 1087 (10th Cir. 1985), *cert. denied* 479 U.S. 994 (1986) (*"Ute Indian Tribe I"*).

The issues litigated in *Ute Indian Tribe I* were (1) whether, by various statutes, Congress intended to diminish the Uintah Valley or Uncompahgre Reservations when those reservations were opened to non-Indian settlement, and (2) the geographic scope of the Tribe's jurisdiction within the original boundaries of the Reservation. 521 F.Supp. at 1075. The district court held that the Uncompahgre Reservation had been disestablished, but that the Uintah Valley Reservation, including the national forest lands, remained largely intact. *See* 521 F.Supp 1072. The Tribe and the State filed cross appeals of the District Court's decision to the United States Court of Appeals for the Tenth Circuit.

On appeal, a two-judge majority of a panel of the Tenth Circuit affirmed in part and reversed in part the district court's findings in *Ute Indian Tribe I*, ruling that the Uintah Valley Reservation had been diminished substantially by the removal, from the Reservation, of lands that had been restored to the public domain in 1905. *See Ute Indian Tribe v. Utah*, 716 F.2d 1298 (10th Cir. 1983) ("*Ute Indian Tribe II*"). However, on rehearing in light of this Court's intervening decision in *Solem v. Bartlett*, 465 U.S. 473 (1984), a majority of the Tenth Circuit, sitting *en banc*, ruled that neither the Uintah Valley nor the Uncompahgre Reservations had been diminished, except for two parcels

whose status was not subsequently litigated. *See* 773 F.2d 1087 (10th Cir. 1985) (*en banc*) ("*Ute Indian Tribe III*"). The defendants sought review by this Court, but the writ of *certiorari* was denied on December 1, 1996. *See Utah v. Ute Indian Tribe*, 479 U.S. 994, 107 S.Ct. 596, 93 L.Ed.2d 596 (1986). Following this Court's denial of the petition for writ of *certiorari*, the Tenth Circuit issued its mandate in *Ute Indian Tribe III* on December 9, 1986.

Unhappy with this Court's refusal to review the Tenth Circuit's decision, Duchesne County, proceeding under the name of "the State", raised the boundary issue in the courts of the State of Utah.

*State v. Hagen*

In 1988, the County of Duchesne filed an information against Robert P. Hagen, charging him with distribution of a controlled substance (i.e., marijuana) for value, a third-degree felony. The alleged offense took place on fee lands in Myton, Utah, a community that is located within the original exterior boundaries of the Uintah Valley Reservation and which has a substantial Native American population. Hagen entered a plea of guilty, but subsequently filed a motion to arrest judgment and withdraw his plea, on the grounds that he was Indian and the alleged offense took place in "Indian country".[4]

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[4] "Indian country" includes "(a) all land within the limits of any Indian reservation under the jurisdiction of the United States government, notwithstanding the issuance of any patent, and, including rights-of-way running through the reservation, (b) all dependent Indian communities within the borders of the United States whether within the original or subsequently acquired territory thereof, and whether within or without the limits of a state, and (c) all Indian allotments, the Indian titles to which have not been extinguished, including rights-of-way running through the same." 18 U.S.C. § 1151.

Following an evidentiary hearing, the trial court denied Hagen's motion to arrest judgment and withdraw his plea. The court determined that Hagen was not an Indian for purposes of criminal prosecution because he was not a member of a federally recognized Indian tribe. The court expressly declined to address the issue of whether the locus of the crime was within "Indian country."

On appeal, the Utah Court of Appeals ruled that the trial court had applied the improper standard and burden of proof by requiring Hagen to establish, by clear and convincing evidence, that he was Indian. *State v. Hagen*, 802 P.2d 745 (Utah App. 1990), *rev'd on other grounds*, 858 P.2d 925 (Utah 1992). For that reason alone, the Utah Court of Appeals reversed Hagen's conviction. *Id.* at 747.[5]

The Utah Supreme Court declined to address Hagen's

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[5] Indeed, until it reached the Utah Supreme Court, the only issues litigated in *Hagen* were whether Robert Hagen, whose only affiliation with an Indian tribe is with a Tribe that is not federally recognized, was an Indian for criminal jurisdiction purposes and whether the trial court had applied the proper standard and allocation of the burden of proof in determining that he was *not* Indian. In declining the State's suggestion that it defer ruling in the *Hagen* case pending the Utah Supreme Court's resolution of the boundary issue in *State v. Perank* (discussed below), the Utah Court of Appeals stated:

> [t]he Tenth Circuit's decision does not appear to hold open any role for the state courts in refining its holding in *Ute Indian Tribe [III]* . . . [W]e are hard pressed to see how, given the Supremacy Clause and the doctrine of collateral estoppel, our state courts could reach a contrary decision [on the Reservation boundary issue] that would have any practical effect.

802 P.2d at 747. The State appealed this *dicta* to the Utah Supreme Court, raising the Reservation boundary issue for the first time in the *Hagen* case.

status as an Indian. Instead, on the basis of its decision in *State v. Perank*, 858 P.2d 927 (Utah 1992), entered on the same date, the court summarily ruled that the State had properly prosecuted Robert Hagen because the offense with which he was charged had been committed outside of "Indian country". *See State v. Hagen*, 858 P.2d 925 (1992).

*State v. Perank*

*State v. Perank* arose in 1983 at a time when the Tenth Circuit's panel decision in *Ute Indian Tribe II* (finding that the Uintah Valley Reservation had been diminished by the exclusion, from "Indian country" status, of lands that had been restored to the public domain under the 1902-1905 Acts) was the governing law. Clint Perank entered a guilty plea to a charge of third-degree burglary in Myton, Utah. At the time, Perank was not enrolled, nor was he eligible for enrollment, in the Ute Indian Tribe, the only tribe with which he claimed any affiliation.

Perank's sentence on the burglary offense was commuted to probation. At a revocation-of-probation hearing in 1986, after the Tenth Circuit, sitting *en banc*, had reversed *Ute Indian Tribe II*, concluding that all lands within the original boundaries of the Uintah Valley Reservation remained "Indian country", *see Ute Indian Tribe III*, Perank asserted for the first time that the State lacked jurisdiction to prosecute him for his probation violation or the underlying burglary offense, arguing that he was Indian and the crime had been committed within "Indian country".

As stated by Justice Stewart:

> [t]he only issue [decided by the Utah Supreme Court in *Perank*] is whether the unallotted and unreserved lands that were opened to entry in 1905 . . . are within the present boundaries of the [Uintah

Valley] Reservation.

*State v. Perank*, 858 P.2d 927, 934 (Utah 1992). After examining the 1902-1905 Acts, the Utah Supreme Court

> conclude[d] that operative statutory language that restores reservation land to the public domain is persuasive evidence of congressional intent *to diminish the reservation as to the lands so restored.*

*State v. Perank*, *supra*, 858 P.2d at 940. (emphasis added). *See also* 858 P.2d at 952 ("we hold that the unallotted, unreserved lands of the Uintah Reservation were restored to the public domain by the [1902-1905 Acts] and that the Reservation boundaries were *diminished by that restoration.*") (emphasis added).

In making its ruling in *Perank*, the Utah Supreme Court observed "that all parties agree that the Uintah Reservation . . . continued to exist after 1905 as to the lands allotted to the Indians and the lands reserved for tribal use." 858 P.2d at 934. The court also expressly disavowed any intention to determine the "Indian country" status of lands on the Uintah Valley Reservation that had been withdrawn as a forest reserve or of the Uncompahgre Reservation. *See* 858 P.2d at 934 ("The legal status of the [Ashley and Uintah National Forests] is not at issue here, nor is the legal status of the Uncompahgre Reservation . . . ").

*Hagen v. Utah*

In 1994, this Court granted a petition for writ of *certiorari* "to resolve the direct conflict between the[] decisions of the Tenth Circuit and the Utah Supreme Court on the question whether the Uintah Reservation has been diminished." *Hagen v. Utah*, 510 U.S. 399, 409, 114 S.Ct.

958, 964, 127 L.Ed.2d 252 (1994). After examining the 1902-1905 Acts by which the unallotted lands on the Uintah Valley Reservation were opened to non-Indian settlement, this Court affirmed the limited ruling of the Utah Supreme Court, stating:

> the restoration of unallotted reservation lands to the public domain evidences a congressional intent *with respect to those lands* inconsistent with the continuation of reservation status. Thus, the existence of such language in the operative section of a surplus land Act indicates that the Act *diminished* the reservation.

510 U.S. at 414, 114 S.Ct. at 967 (emphasis added).[6]

*Ute Indian Tribe IV*

Following issuance of this Court's decision in *Hagen v. Utah*, the State of Utah, joined by the petitioner Counties, asked the United States District Court for the District of Utah to dissolve a preliminary injunction that it had issued on September 2, 1992, *nunc pro tunc* August 2, 1992, in the renewed *Ute Indian Tribe* litigation.[7] In support of their

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[6] Without explanation, neither this Court in *Hagen* nor the Utah Supreme Court in *Perank* considered whether Myton, Utah, which has a substantial Native American population, might be "Indian country" under 18 U.S.C. § 1151(c) as being a "dependent Indian community"

[7] The preliminary injunction prohibited the State and its political subdivisions from interfering in the Tribe's exercise of governmental authority within the boundaries of the Uintah and Ouray Reservation, as those boundaries had been confirmed by the Tenth Circuit's decision in *Ute Indian Tribe v. Utah*, 773 F.2d 1087 (1985), *cert. denied*, 479 U.S.

(continued...)

motion, and notwithstanding the express language used by this Court and the Utah Supreme Court, the State and Counties argued that *Hagen* effected a termination of the Uintah Valley Reservation, with the affect that all lands on the Reservation lost their "Indian country" status when they passed from trust to fee status. The Tribe, supported by the United States, asserted that in *Hagen* this Court had merely found that the Uintah Valley Reservation had been diminished by the exclusion therefrom of those lands that were opened to non-Indian settlement under the 1902-1905 Acts, and which had not been subsequently restored to tribal ownership by congressional and administrative action.[8] Observing that this Court had concluded only that the Uintah Valley Reservation had been diminished, the Tribe asserted

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[7](...continued)
994 (1986), pending the conclusion of this Court's disposition of Robert Hagen's petition for a writ of *certiorari* and the conclusion in the district court of the Ute Indian Tribe's motion for a permanent injunction preventing the *Ute Indian Tribe* defendants from enforcing the Utah Supreme Court's decision in *Perank*. The district court's injunction was modified once "to allow the State and Local Defendants to prosecute felony crimes occurring on lands within the original boundaries of the Uintah Valley Reservation which are not 'Indian Country', as defined by 18 U.S.C. § 1151". Order, *Ute Indian Tribe v. Utah*, unpublished, (D. Utah May 2, 1994).

[8] At various times, pursuant mainly to the provisions of the Indian Reorganization Act of 1934, the Secretary of the Interior has restored to tribal ownership all of the unallotted acreage within the Uintah Valley Reservation that remained unentered. *See* Order of Restoration, 10 Fed. Reg. 12409 (Aug. 25, 1945); Public Land Order No. 2713, 18 Fed. Reg. 426 (Jan. 20, 1953); Public Land Order No. 1310, 21 Fed. Reg. 5015 (July 5, 1956); Public Land Order No. 2002, 24 Fed. Reg. 8175 (Oct. 8, 1959); Public Land Order No. 2269, 26 Fed. Reg. 1718 (Feb. 28, 1961). Each of the tracts of land addressed in these Public Land Orders was expressly "added to and made a part of the existing [Uintah and Ouray] reservation." *Id.*

that all fee lands *except* those opened to settlement under the 1902-1905 Acts remained "Indian country".[9]

In deciding whether to grant the defendants' motion, the district court examined the conflicts between this Court's judgment in *Hagen,* the Utah Supreme Court's decision in *Perank*, and the Tenth Circuit's judgment in *Ute Indian Tribe III* and concluded that

> *Hagen* . . . effectively determined that the Uintah Reservation was *diminished* to the extent of the unallotted and unreserved lands that were opened to entry in 1905. To the extent that those lands were not later restored to tribal ownership and jurisdiction by subsequent congressional and administrative action, they ceased to have reservation status in 1905 and are no longer found within "Indian country" within the meaning of 18 U.S.C. § 1151. *To that extent, Hagen stands in direct conflict with the Tenth Circuit's en banc ruling in Ute Indian Tribe. . ..* At the same time, the Uintah Reservation, as an entity, continued

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[9] As discussed below, there are four categories of fee land on the Uintah Valley Reservation: (1) lands opened to settlement under the 1902-1905 Acts: (2) allotments that were made to individual Indians in 1905 that have since passed into fee status; (3) lands that were held in trust in 1905, but that passed into fee status in 1956 under the terms of the Ute Termination and Supervision Act, Act of Aug. 27, 1954, Pub. L. No. 97-678, ch. 1009, 68 Stat. 868, *codified at* 25 U.S.C. §§ 677-677aa; and (4) lands that were held in trust after the Reservation was opened in 1905 but that since have been exchanged into fee status by the Tribe for then-fee (now trust) lands under the terms of the Indian Land Consolidation Act of 1983, Pub. L. No. 47-459, 96 Stat. 2517, *codified at* 25 U.S.C. §§ 2201-11. In *Hagen*, only the first category was considered by this Court, and was determined to be outside of "Indian country". *See* 510 U.S. at 414, 114 S.Ct. at 967. It is the status of the latter three categories that the petitioners seek to put at issue in these proceedings.

> to exist after 1905 as to allotted and reserved lands not "opened" and as to lands later restored to the reservation by Congress or the Department of the Interior. . .

935 F.Supp. 1473, 1497 (D. Utah 1996) (emphasis added). The district court then undertook a detailed examination of the statutes by which the three disputed categories of fee land on the Uintah Valley Reservation that were *not* examined in *Hagen* or *Perank* passed from trust to fee status. *See* 935 F.Supp. at 1496-1505. The district court concluded that *none* of the statutes under which the status of the disputed categories of fee lands was changed expressed a Congressional intent to remove the affected lands from "Indian country". *See id.*

To the limited extent that it found that *Hagen* did directly conflict with *Ute Indian Tribe III*, the district court modified its injunction. Under the modified injunction, the State of Utah and petitioner Counties are authorized to prosecute felony crimes occurring on lands which are not "Indian Country" [including] those unallotted and unreserved lands of the Uintah Reservation that were opened to entry in 1905 . . . ". 935 F.Supp. at 1531.

*Ute Indian Tribe V*

The Court of Appeals concurred with the District Court's application of this Court's ruling in *Hagen:*

> we agree with the district court that *Hagen* did not effectively overrule the entire judgment in *Ute Indian Tribe III*, including our holdings concerning the National Forest Lands and the Uncompahgre Reservation. Further, we agree that *Hagen's* only effect was to reduce (and

> not terminate) the boundaries of the Uintah Valley Reservation. . ..

*Ute Indian Tribe v. Utah*, 114 F.3d 1513, 1528 (10th Cir. 1997) ("*Ute Indian Tribe V*"). Accordingly, the Tenth Circuit declined to withdraw its earlier mandate and, instead, modified its mandate to exclude from "Indian country" those "lands within the original [Uintah Valley] reservation boundaries [that were] unallotted, opened to non-Indian settlement under the 1902-1905 legislation, and not thereafter returned to tribal ownership." *Id.*

In so ruling, the Tenth Circuit explicitly stated:

> our decision to modify *Ute Indian Tribe III* does not result from the desire to correct a prior erroneous judgment, but rather from the need to reconcile our decision with a directly conflicting decision of the Supreme Court.

*Id.* at 1529.

In their petition for a writ of *certiorari*, the Counties ask this Court to expand this Court's judgment in *Hagen* and completely overrule the Tenth Circuit's 1985 judgment in *Ute Indian Tribe III*.

## REASONS WHY THIS COURT SHOULD DENY THE PETITION FOR WRIT OF *CERTIORARI*

The crux of the dispute presented to this Court in the petition for a writ of *certiorari* is whether the petitioners should be permitted to expand this Court's decision in *Hagen v. Utah* to exclude from the Uintah Valley Reservation lands that passed from trust to fee status under Acts *other* than those considered by this Court in *Hagen*. Specifically at issue is whether

1. lands that were allotted to individual Indians in 1905 and that since have passed into fee status under the General Allotment Act, Act of Feb. 8, 1887, ch. 119, 24 Stat. 388;

2. lands that were held in trust after 1905 but were later apportioned to the "Mixed-Blood" Utes under the Ute Termination and Supervision Act, Act of Aug. 27, 1954, Pub.L. No. 97-678, ch. 1009, 68 Stat. 868, *codified at* 25 U.S.C. §§ 677-677aa; and

3. lands that were held in trust after the Reservation was opened in 1905 but that since have been exchanged into fee status by the Ute Indian Tribe for then-fee (now trust) lands in an effort to consolidate the Tribe's land holdings under the Indian Land Consolidation Act of 1983, Pub.L. No. 47-459, 96 Stat. 2517, *codified at* 25 U.S.C. §§ 2201-11

remain "Indian country" as being "lands within the limits of an Indian reservation" under 18 U.S.C. § 1151(a).

In *Ute Indian Tribe V*, the Tenth Circuit affirmed the district court's detailed analysis of the statutes that concern each of these three categories of land and its conclusion that *none* of the statutes expresses a congressional intent to remove the various categories of land from the Uintah Valley Reservation. *See* 114 F.3d at 1528. Accordingly, the Tenth Circuit ruled that the lands embraced within each category remain "Indian country".

Throughout their petition for a writ of *certiorari*, the petitioners suggest that *Ute Indian Tribe V* conflicts with this Court's decision in *Hagen v. Utah*, *see* Petition for Writ of *Certiorari* at 14-20 [hereafter, "Pet. Br. at __"] and the Utah

Supreme Court's decision in *State v. Perank*. *See* Pet. Br. at 21-29. However, a reading of the relevant decisions demonstrates that the alleged conflicts simply do not exist. Moreover, the petitioners ultimately admit that they do not meet this Court's criteria for being granted a petition for writ of *certiorari*. *See* Pet. Br. at 30. Thus, in desperation, they appeal to this Court for "some type of appropriate relief." *Id.*

For the reasons discussed below, this Court should deny the petition for a writ of *certiorari* and should also deny the petitioners' request for "some [unspecified] type of . . . relief."

## I. *Ute Indian Tribe V* Is in Accord With This Court's Previous Reservation-Diminishment Decisions, Including *Hagen v. Utah*.

The petitioners assert that this Court should grant the petition for writ of *certiorari* for the reason that the Tenth Circuit's decision in *Ute Indian Tribe V* conflicts with this Court's decision in *Hagen v. Utah*. In making this argument, the petitioners misapprehend this Court's previous reservation-diminishment decisions, generally, and this Court's decision in *Hagen*, specifically.

### A. *Ute Indian Tribe V* Correctly Recognizes That This Court Found that the Uintah Valley Reservation Continues to Exist, Albeit Diminished in Size.

The petitioners suggest that the Tenth Circuit erred when it failed to recognize that, when this Court characterized the Uintah Valley Reservation as being "diminished" after 1905, it, in fact, meant that the Reservation had been "terminated." *See* Pet. Br. at 14-20. The petitioners' argument attributes a lack of grammatical

precision to this Court that is unwarranted.

In *Hagen v. Utah*, this Court ruled that:

> the restoration of unallotted reservation lands to the public domain evidences a congressional intent *with respect to those lands* inconsistent with the continuation of reservation status. Thus, the existence of such language in the operative section of a surplus land Act indicates that the Act *diminished* the reservation.

*Hagen v. Utah*, 510 U.S. at 414, 114 S.Ct. at 967 (emphasis added). In analyzing this language, the Tenth Circuit found that this Court

> did not decide that the 1902-1905 allotment legislation completely disestablished the Uintah Valley Reservation, erasing its outer boundaries and rendering [25 U.S.C.] § 1151(a) inapplicable to the three disputed categories of [fee] lands.

*Ute Indian Tribe V*, 114 F.3d at 1530. Instead, the Tenth Circuit found that:

> [t]he Court stated that the Uintah Valley Reservation had been 'diminished' - not 'disestablished,' 'eliminated,' or 'terminated.' Moreover, the diminishment was only 'with respect to those lands' that had been restored to the public domain under the 1902-1905 legislation.

*Id.* On that basis, the Tenth Circuit concluded that "*Hagen* did not erase the boundaries of the Uintah Valley Reservation". Based upon the district court's analysis of the statutes by which the three disputed categories of fee land

passed into non-trust status, the Tenth Circuit further determined that "the current 'limits of [the] reservation' . . . embrace the three categories of non-trust lands at issue." *Ibid.* The Tenth Circuit's determinations are entirely consistent with this Court's precedents.

Despite the petitioners' suggestion to the contrary, in only one of this Court's reservation-diminishment decisions has this Court found that a surplus land act had the effect of terminating, in its entirety, the existence of an Indian reservation. *See DeCoteau v. District County Court*, 420 U.S. 425, 426, 95 S.Ct. 1082, 1084, 43 L.Ed.2d 300 (1975) (finding that an 1891 Act "terminated" the Lake Traverse Indian Reservation). In *every* other instance where this Court has examined a surplus land act, it has found either that (1) Congress did not intend to affect the "Indian country" status of the opened lands, *see Solem v. Bartlett*, 465 U.S. 463, 481, 104 S.Ct. 1161, 1171, 79 L.Ed.2d 443 (1984) (Cheyenne River Sioux Reservation "was not diminished" by the Act of May 29, 1908); *Mattz v. Arnett*, 412 U.S. 481, 505, 93 S.Ct. 2245, 2258, 37 L.Ed.2d 92 (1973) (Klamath River Reservation "was not terminated" by 1892 Act); *Seymour v. Superintendent*, 368 U.S. 351, 355, 82 S.Ct. 424, 427, 7 L.Ed.2d (1962) (1906 Act did not "destroy the existence of the diminished Colville Indian Reservation"), or that (2) Congress intended to diminish the boundaries of the affected reservation by removing from the *existing* reservation those lands that were opened to non-Indian settlement. *See Hagen v. Utah*, *supra*, 510 U.S. at 421, 114 S.Ct. at 970 (Uintah Indian Reservation "has been diminished by Congress"); *Rosebud Sioux Tribe v. Kneip*, 430 U.S. 584, 614, 97 S.Ct. 1361, 1377, 51 L.Ed.2d 660 (1977) (by various Acts, Congress intended "to change the boundaries of the original

1889 Rosebud Reservation").[10]

Notwithstanding this Court's clear precedent, the petitioners argue that *DeCoteau* establishes a *per se* rule from which the Tenth Circuit deviated in *Ute Indian Tribe V.* With *DeCoteau* as their lone and questionable benchmark, the petitioners argue that this Court's conclusion that the Uintah Valley Reservation was *diminished* by the 1902-1905 Acts, in fact means that the Reservation was *terminated* and that the only lands within the Uintah Valley Reservation that remain "Indian country" are those lands that are held in trust status. *See* Pet. Br. at 14-20.

The petitioners' argument ignores the clear language of this Court's precedents. When this Court determines that an Indian reservation has, or examines whether an Indian reservation may have, been terminated, in its entirety, so that the only remaining "Indian country" consists of trust lands, this Court uses clear language to that effect. *E.g., DeCoteau v. District County Court, supra*, 420 U.S. at 426, 95 S.Ct. 1082 (reservation was "terminated"); *Seymour v. Superintendent*, 368 U.S. at 355, 82 S.Ct. at 427 (North Half of reservation was "wiped out"); *id.* (existence of South Half of reservation was not "destroy[ed]").

In *Rosebud Sioux Tribe*, the Court acknowledged that it knows the difference between a finding that a reservation has been diminished and a finding that a reservation has been extinguished:

> unlike the situation in *DeCoteau*, we are not faced with an Act which, if it *disestablished*

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[10] The Court also has summarily concluded that language providing that the North Half of the Colville Indian Reservation should be "*vacated* and restored to the public domain" had the effect of "wiping out" that section of the Colville Reservation. *See Seymour v. Superintendent, supra*, 368 U.S. at 355, 82 S.Ct. at 427 (emphasis added).

> the area under question, would *terminate* the entire reservation.

430 U.S. at 598, n.20, 97 S.Ct. at 1368, n.20 (emphasis added). In *Hagen*, the Court did not state that the Uintah Valley Reservation had been terminated. Rather, as the Tenth Circuit acknowledged, *see* 114 F.3d at 1530, it stated clearly and unequivocally that the Reservation continues to exist, albeit diminished in size. *See* 510 S.Ct. at 421, 114 S.Ct. at 970 ("[w]e conclude that the Uintah Indian Reservation has been diminished by Congress."). *See also* 510 U.S. at 432, 114 S.Ct. at 976 (Blackmun, J., dissenting) ("the Uintah Valley Reservation *unquestionably* survived the opening. . .") (emphasis added). *Accord State v. Perank*, 858 P.2d at 934 ("all parties agree that the Uintah Reservation . . . continued to exist after 1905 as to the lands allotted to the Indians and the lands reserved for tribal use.").

Because both this Court and the Utah Supreme Court found that the Uintah Valley Reservation continued to exist after 1905, the Tenth Circuit was correct in rejecting the petitioners' argument that lands that passed out of fee status pursuant to statutes other than the 1902-1905 Acts are no longer "Indian country". Accordingly, the petition for a writ of *certiorari* to review *Ute Indian Tribe V* should be denied.

### B. *Ute Indian Tribe V* Correctly Holds That all Lands on the Uintah Valley Reservation That Were Not Restored to the Public Domain Remain "Indian country".

In an effort to persuade this Court to grant their petition for a writ of *certiorari*, the petitioners erroneously characterize the Tenth Circuit's decision in *Ute Indian Tribe V* as being unique among reservation diminishment cases in that it "leave[s] substantial non-Indian fee lands within

original reservation boundaries *after an area had been restored to the public domain.*" Petitioners' Br. at 16 (emphasis in original). Again, the petitioners' assertion attempts to alter the history of land ownership on the Uintah Valley Reservation and mischaracterizes the Tenth Circuit's ruling in *Ute Indian Tribe V*.

When this Court decided *Hagen v. Utah*, it determined that language in the operative section of a surplus land act "restor[ing] unallotted reservation lands to the public domain" had the talismanic effect of diminishing the affected reservation "with respect to those lands [so restored]". *See Hagen v. Utah, supra*, 510 U.S. at 414, 114 S.Ct. at 967. As the district court correctly noted, *see Ute Indian Tribe IV*, 935 F.Supp at 1501-05, and the Tenth Circuit affirmed, *see Ute Indian Tribe V*, 114 F.3d at 1528, *none* of the disputed fee lands was ever "restored to the public domain." Rather, *all* of those lands were included as trust lands within the diminished Uintah Valley Reservation as it existed in 1905, *after* the unallotted lands on the Reservation were opened to non-Indian settlement.

The lands within the disputed categories were transferred from trust to fee status under the authority of statutes *other* than the 1902-1905 Acts, *none* of which contains the talismanic phrase "restored to the public domain". *See Ute Indian Tribe IV*, 935 F.Supp. at 1501-05. Neither this Court nor the Utah Supreme Court has examined the effect that those *other* statutes had on the "Indian country" status of the disputed fee lands.

In determining whether, and to what extent, an Indian reservation has been diminished:

> [t]he first and governing principle is that only Congress can divest a reservation of its land and diminish its boundaries. Once a block of land is set aside for an Indian Reservation and

> no matter what happens to the title of individual plots within the area, the entire block retains its reservation status unless Congress explicitly indicates otherwise.

*Solem v. Bartlett*, 465 U.S. at 470, 104 S.Ct. at 1166. The district court applied this rule when it determined that the three disputed categories of fee land on the Uintah Valley Reservation remain "Indian country" under 18 U.S.C. § 1511(a), as being lands "within the limits of an Indian reservation." *See* 935 F.Supp. at 1496-1505. In affirming the district court's analysis and conclusion, the Tenth Circuit correctly determined that:

> 1. *Hagen* directly conflicts with *Ute Indian Tribe III*, insofar as that decision held that those lands restored to the public domain under the 1902-1905 Acts remained "Indian country"; but that
>
> 2. Because *Hagen* did not (because it did not need to) address the "Indian country" status of the three disputed categories of fee land (i.e., those lands that passed from trust to fee status under statutes other than the 1902-1905 Acts), *Hagen* does not directly conflict with *Ute Indian Tribe III*, insofar as that decision held that the latter three categories of fee land remain "Indian country".

*See* 114 F.3d at 1528.

Because neither this Court nor the Utah Supreme Court has ever examined the effect that the General Allotment Act, the Ute Termination and Supervision Act, and the Indian Land Consolidation Act had on the "Indian

country" status of lands that passed from trust to fee status under there authority of those Acts, there can be no conflict between the Tenth Circuit's decision with respect to those lands and any decision of this Court or of the Utah Supreme Court. The absence of any conflict between *Ute Indian Tribe V* and any decision of this Court or of any State supreme court militates in favor of this Court denying the petition for writ of *certiorari*.

## II. *Ute Indian Tribe V* Does Not Conflict With Any State Supreme Court Decision, Including *State v. Perank*.

The petitioners suggest that the Tenth Circuit's refusal to conclude that all fee lands within the Uintah Valley Reservation are no longer within "Indian country" conflicts with the Utah Supreme Court's ruling in *State v. Perank*, 858 P.2d 927 (Utah 1992). Again, the petitioners misstate a judicial ruling.

In *Perank*, the limited question before the Utah Supreme Court was "whether the unallotted and unreserved lands that were opened to entry in 1905 . . . are within the present boundaries of the [Uintah Valley] Reservation." *See* 858 P.2d at 934. In answering that question, the Utah Supreme Court analyzed the 1902-1905 Acts that opened the unallotted lands on the Uintah Valley Reservation to non-Indian settlement and

> conclude[d] that operative statutory language that restores reservation land to the public domain is persuasive evidence of congressional intent *to diminish the reservation as to the land so restored.*

858 P.2d at 940 (emphasis added). The conclusion of the

Utah Supreme Court is expressed in functionally identical language to the conclusion that this Court reached in *Hagen*, to wit:

> [w]e hold that the restoration of unallotted reservation lands to the public domain evidences a congressional intent *with respect to those lands* inconsistent with the continuation of reservation status. Thus, the existence of such language in the operative section of a surplus land Act indicates that the Act *diminished* the reservation.

510 U.S. at 414, 114 S.Ct. at 967 (emphasis added). As discussed in Part I(A), above, the Tenth Circuit correctly applied this Court's (and the Utah Supreme Court's analogous) conclusion when it *rejected* the petitioners' argument that a *diminished* reservation equates to a *terminated* reservation. Consistent with *Hagen* (*and* with *Perank)*, the Tenth Circuit modified its 1985 mandate by excluding from "Indian country" those lands on the Uintah Valley Reservation that were restored to the public domain under the 1902-1905 Acts. Because the Tenth Circuit's actions are completely consistent with this Court's holding in *Hagen* (and with the Utah Supreme Court's comparable ruling in *Perank*), the petition for a writ of *certiorari* to review *Ute Indian Tribe V* should be denied.

## III. The Petitioners' Attempt to Use this Court's Supervisory Authority to Address Issues that this Court Did Not Address in *Hagen* and that the Utah Supreme Court Expressly Declined to Address in *Perank* Should be Rejected.

On September 17, *1985*, the Tenth Circuit entered its judgment in *Ute Indian Tribe III*. In that judgment, the Tenth Circuit ruled that lands set aside from the Uintah Valley Reservation as a national forest and all lands within the Uncompahgre Reservation remained "Indian country". *See* 773 F.2d at 1089-90 (National Forest); 773 F.2d at 1090-93 (Uncompahgre Reservation). The Counties (at that time, joined by the State of Utah) petitioned this Court for a writ of *certiorari* to review, among other things, the Tenth Circuit's decision with respect to the national forest lands and Uncompahgre Reservation. This Court denied the Counties' petition on December 1, 1996. *See Utah v. Ute Indian Tribe*, 479 U.S. 994, 107 S.Ct. 596, 93 L.Ed.2d 596 (1986).

More than 10 years after *Ute Indian Tribe III* was entered as a final judgment, the Counties asked the district court and, later, a panel of the Tenth Circuit to overrule the Tenth Circuit's *en banc* decision that the national forest lands and the Uncompahgre Reservation remain Indian country. In declining the Counties' request to upset a judgment that had been final for more than a decade, the Tenth Circuit correctly observed that this Court had not addressed the status of the national forest lands or the Uncompahgre Reservation in *Hagen*, *See* 114 F.3d at 1528-29.[11] The court then went on

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[11] Similarly, the Utah Supreme Court expressly disavowed any intention to determine the "Indian country" status of those lands in *State v. Perank*. *See* 858 P.2d at 934 ("The legal status of the [Ashley and

(continued...)

to declare *Ute Indian Tribe III* to be, and to have been for more than 12 years, a final judgment (a fact that the petitioners have been unable to accept for more than a decade). *See* 114 F.3d at 1521. Because *Ute Indian Tribe III* was no longer *sub judice* when this Court published its decision in *Hagen*, the Tenth Circuit found that the change in the law effected by *Hagen* could not be used to "reopen the door already closed". *Id.* at 1521, quoting *James B. Beam Distilling Co. v. Georgia*, 501 U.S. 529, 541, 111 S.Ct. 2439, 2446, 115 L.Ed.2d 481 (1991). Accordingly, the Tenth Circuit declined to withdraw its 1985 mandate in its entirety, finding that:

> [t]o the extent that *Ute Indian Tribe III* decided matters not addressed in *Hagen*, finality requires those decisions to remain undisturbed. Thus, we modify our earlier judgment *only to the extent that it directly conflicts with the holding in Hagen.*

114 F.2d at 1527.[12] The Tenth Circuit expressly stated that its decision to modify the mandate in *Ute Indian Tribe III* "does not result from the desire to correct a prior erroneous judgment, but rather from the need to reconcile our decision with a directly conflicting decision of the Supreme Court." *Id.* at 1528.

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[11](...continued)
Uintah National Forests] is not at issue here, nor is the legal status of the Uncompahgre Reservation.").

[12] Under the Tenth Circuit's modified mandate, and consistent with this Court's holding in *Hagen v. Utah*, all fee lands, except those that were restored to the public domain pursuant to the 1902-1905 Acts, remain "Indian country". *Ute Indian Tribe V*, 114 F.3d at 1529-31.

Through their petition for a writ of *certiorari*, the petitioners are asking this Court to reopen a door that has been closed for more than 10 years: they are asking this Court to declare the national forest lands and the Uncompahgre Reservation to be outside of "Indian country". *See* Pet. Br. at 14, n.6. This Court should decline the Counties' request, as did the Tenth Circuit.

This Court will grant a petition for a writ of *certiorari* only for compelling reasons. *See* Sup. Ct. Rule 10. Those reasons include when:

> a United States court of appeals . . . has decided an important federal question in a way that conflicts with a decision by a state court of last resort. . . ; or when
>
> a United States court of appeals has decided . . . an important federal question in a way that conflicts with relevant decisions of this Court.

*Id.* at (a), (c). As discussed at n.11, above, neither this Court, in *Hagen*, nor the Utah Supreme Court, in *Perank*, addressed the status of the national forest lands or of the Uncompahgre Reservation. Accordingly, there is no conflict with *Ute Indian Tribe III's* holding regarding those lands and *any* decision of this Court or of any state court of last resort, and there is no basis for granting the petition for a writ of *certiorari* under Sup. Ct. Rule 10(a) or (c).

More importantly, a petition for writ of *certiorari* must be filed within 90 days after entry of the judgment sought to be reviewed. *See* Sup. Ct. Rule 13(1). The last court that addressed and decided the "Indian country" status of the national forest lands and of the Uncompahgre Reservation on the merits was the Tenth Circuit . . . in 1985 in *Ute Indian Tribe III*. Notwithstanding Sup. Ct. Rule 13(1), the petitioners have asked this Court to review that

decision not 90, but *4,098*, days after the judgment was entered. Pursuant to this Court's rules, the petitioners' request should be denied.

## CONCLUSION

For more than 22 years, the petitioners have been urging the federal and state courts to terminate the existence of the Uintah Valley Reservation. *Every* court which has heard the petitioners' arguments - including the federal district court for the District of Utah, the United States Court of Appeals for the Tenth Circuit, the Utah Supreme Court, and the Supreme Court of the United States -has rejected those arguments and has found, instead, that the Uintah Valley Reservation was merely diminished by the exclusion therefrom of unallotted, opened lands of the Reservation that were restored to the public domain.

Through their petition for a writ of *certiorari*, the petitioners unabashedly seek to expand this Court's ruling in *Hagen*, and thereby realize the same result that they would have achieved had *any* court accepted their argument that the Uintah Valley Reservation was extinguished. The petitioners simply should not be permitted to use this Court's supervisory powers to disturb a final judgment that was entered more than 12 years ago.

In *Hagen*, this Court found that the Uintah Valley Reservation was diminished by the restoration of unallotted Indian lands to the public domain under the 1902-1905 Acts. As a consequence of that ruling, the Ute Indian Tribe has lost the authority to govern the conduct of its members on hundreds of thousands of acres of land. The petitioners' attempt to expand this Court's ruling to a determination that the Reservation was extinguished, an expansion that would deprive the Tribe of the authority to govern its members' conduct on millions of additional acres, should be rejected.

As the petitioners acknowledge, they do not qualify for a writ of *certiorari*. *See* Pet. Br. at 30. In that respect, the petition is accurate. Because the Tenth Circuit's decision in *Ute Indian Tribe V* is consistent with this Court's judgment in *Hagen*; this Court's decisions in every other reservation-diminishment case; and the Utah Supreme Court's opinion in *State v. Perank*, the petition for a writ of *certiorari* to review *Ute Indian Tribe V* should be denied.

Respectfully submitted this 31st day of October, 1997.

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